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5 Counsel for Defendant  
6 WALTER ADILIO AJIATAS-MAZARIEGOS

7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9  
10 UNITED STATES OF AMERICA, ) Nos. CR-08-0920 CRB  
11 Plaintiff, ) CR 03-0001 CRB  
12 vs. )  
13 WALTER ADILIO AJIATAS- ) DEFENDANT'S NOTICE OF MOTION  
14 MAZARIEGOS, ) AND MOTION TO DISMISS  
15 Defendant. ) PROBATION FORM 12  
16 ) Date: To Be Set  
17 ) Time: 2:15 p.m.  
18 ) Hon. Charles R. Breyer

19 **TO: JOSEPH P. RUSSONIELLO, UNITED STATES ATTORNEY, AND TO DARYL**  
20 **T. EREMIN, SPECIAL ASSISTANT UNITED STATES ATTORNEY:**

21 PLEASE TAKE NOTICE that at the time and place specified  
22 above, or as soon thereafter as the matter may be heard, in the  
23 courtroom of the Honorable CHARLES R. BREYER, United States  
24 District Judge, the defendant, through his counsel, John J.  
25 Jordan, will move and does hereby move this honorable court for  
26 entry of an order dismissing the indictment against the  
27 defendant, pursuant to the Due Process Clause and Fed. R. Crim.  
28 P. 32.

This request is made pursuant to the Due Process Clause of  
the Fifth Amendment to the United States Constitution, Fed. R.

Crim. P. 32, the accompanying declaration, the pleadings and records on file in this matter, and upon such evidence and argument which may be presented prior to and at the hearing on this motion.

Dated: April 28, 2009 Respectfully submitted,

/S/ John J. Jordan  
JOHN J. JORDAN  
Attorney for Defendant  
WALTER ADILIO AJIATAS-MAZARIEGOS

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7 Counsel for Defendant  
8 WALTER ADILIO AJIATAS-MAZARIEGOS

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10 IN THE UNITED STATES DISTRICT COURT  
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12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13  
14

15 UNITED STATES OF AMERICA, ) No. CR 03-0001 CRB  
16 vs. Plaintiff, )  
17 ) DEFENDANT'S MEMORANDUM OF  
18 ) POINTS AND AUTHORITIES IN  
19 ) SUPPORT OF MOTION TO DISMISS  
20 ) PROBATION FORM 12  
21 )  
22 ) Defendant. Date: To Be Set  
23 ) Time: 2:15 p.m.  
24 ) Hon. Charles R. Breyer  
25 )  
26 )  
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16 **INTRODUCTION**

17 The defendant, through his counsel, John J. Jordan, files  
18 this memorandum of points and authorities in support of the  
19 defendant's Fed. R. Crim. P. 32 motion to dismiss the pending  
20 Form 12 Probation violation pending against the defendant, due to  
21 the unreasonable four year delay in executing the warrant and  
22 then a further almost four month delay before obtaining the  
23 initial appearance of the defendant on the warrant.

24 The defendant's due process rights have been violated here,  
25 when the government deported him in 2004 after a new misdemeanor  
26 re-entry conviction, and then obtained an arrest warrant for the  
27 same man they had just ejected from this country.  
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## **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

The defendant is before this court on two matters. In  
*United States v. Walter Adilio Ajuntas-Mazariegos*, CR. No. 08-  
0920 CRB, he is charged with illegal re-entry following  
deportation, in violation of 8 U.S.C. § 1326. This charge was  
filed on November 25, 2008, and the defendant was taken into  
federal custody that same date.

In this illegal re-entry case, the defendant disagrees with the government's position that his prior 2003 misdemeanor conviction for assault on a federal officer, in violation of 18 U.S.C. § 111(a)(1) constitutes an aggravated felony under the applicable U.S.S.G. guidelines for 8 U.S.C. § 1326, and accordingly intends to enter an open guilty plea before this Court and seek determination of that issue.

15 The second matter before this Court is a supervised release  
16 violation arising out of a 2003 misdemeanor assault conviction,  
17 *United States v. Walter Adilio Ajuntas-Mazariegos*, CR. No. 03-  
18 0001 CRB. This Court recently granted the government's motion to  
19 relate that case to the pending first case, the illegal re-entry  
20 case, CR. No. 08-0920 CRB. It is this second matter that the  
21 motion to dismiss is directed against.

In the supervised release Form 12 petition, *United States v. Walter Adilio Ajuntas-Mazariegos*, CR. No. 03-0001 CRB, the case was originally assigned to Magistrate Spero and prosecuted in Magistrate Court.

1       On March 28, 2003, the defendant pled guilty to one count of  
2 assault on a federal officer, in violation of 18 U.S.C. §  
3 111(a)(1). Docket Entry 11.

4       On July 11, 2003, the defendant was sentenced in that case  
5 to 12 months custody, followed by 12 months supervised release.  
6 Docket Entry 16.

7       According to the Form 12 later filed by the Probation  
8 Department, the defendant commenced supervision on December 20,  
9 2003.

10      On August 4, 2004, the defendant was arrested by the Bureau  
11 of Immigration and Customs Enforcement in Tucson, Arizona for  
12 illegally re-entering the country.

13      On August 9, 2004, the defendant pled guilty in the United  
14 States District Court in Arizona to a misdemeanor violation of 8  
15 U.S.C. § 1325, under court no. 04-3473M-P. He was summarily  
16 sentenced the same day to 60 days custody, with no supervision to  
17 follow.

18      Defendant informs counsel that he was told this would clear  
19 his federal case, there would be no further criminal sanctions,  
20 and he would be deported after he served his sentence. Defendant  
21 also informs counsel that he was deported to his native Guatemala  
22 on approximately November 21, 2004, after serving the 60 day  
23 sentence.

24      The pending Form 12 provided by the Court to counsel  
25 indicates that the Probation Department in this District applied  
26 for an arrest warrant for the defendant on December 7, 2004, but  
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28

1 made no mention of the fact that defendant was already apparently  
2 deported.

3 On December 13, 2004, the magistrate court issued an arrest  
4 warrant for defendant on the Form 12 application. Docket Entry  
5 21.

6 On November 25, 2008, the defendant was taken into federal  
7 custody after serving time for a California state DUI case. The  
8 defendant was brought to court in the case of *United States v.*  
9 *Walter Adilio Ajuntas-Mazariegos*, CR. No. 08-0920 CRB, in which  
10 he is charged with illegal re-entry following deportation, in  
11 violation of 8 U.S.C. § 1326.

12 On April 8, 2009, the defendant was finally arraigned on the  
13 supervised release Form 12 petition. Docket Entry 26.

14 **ARGUMENT**

15 The government deliberately delayed defendant's appearance  
16 on the Form 12 violation by deporting him first, and then issuing  
17 an arrest warrant for him. This caused an unreasonable four year  
18 delay in executing the warrant. Even after he returned to this  
19 country, the government still waited until he had finished his  
20 state DUI sentence before bringing him to federal court in  
21 November, 2008. Then, the government waited almost four more  
22 months before finally obtaining the initial appearance of the  
23 defendant on the warrant. This is a violation of the defendant's  
24 due process rights.

25 Fed. R. Crim. P. 32.1(b) (1) (A) provides that a preliminary  
26 hearing on a supervised release violation must be promptly  
27 conducted. A defendant's right to such a hearing arises under  
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1 the Due Process Clause of the Fifth Amendment, as applied to  
2 parole and probation revocation proceedings. *United States v.*  
3 *Santana*, 526 F.3d 1257, 1259 (9th Cir. 2008), citing *Morrissey v.*  
4 *Brewer*, 408 U.S. 471, 485 (1972) and *Gagnon v. Scarpelli*, 411  
5 U.S. 778, 782 (1973). "Morrissey stated that a parolee was  
6 entitled to a preliminary hearing, which should be held "as  
7 promptly as convenient after arrest" and to a final revocation  
8 proceeding to be held "within a reasonable time after the parolee  
9 is taken into custody," *United States v. Santana*, 526 F.3d at  
10 1259, citing *Morrissey v. Brewer*, 408 U.S. at 485, 488.

11       The requirements of *Morrissey* were formalized in Federal  
12 Rule of Criminal Procedure 32.1, with revocation hearings covered  
13 under Rule 32.1(b) (2). Revocation hearings, like the other two  
14 hearings, has a timeliness requirement in the rule. Fed. R.  
15 Crim. P. 32.1(b) (2) (final hearing to be held "within a  
16 reasonable time"). For the initial appearance, "A person held in  
17 custody for violating probation or supervised release must be  
18 taken without unnecessary delay before a magistrate judge." Fed.  
19 R. Crim. P. 32.1(a) (1); see also 18 U.S.C. § 3606 ("[U]pon  
20 arrest, [a person alleged to have violated terms of supervised  
21 release] shall be taken without unnecessary delay before the  
22 court having jurisdiction over him.").

23       To qualify for relief from an unreasonable delay in  
24 conducting a hearing on a supervised release Form 12, the  
25 defendant must show both (1) an unreasonable delay and (2) actual  
26 prejudice. *United States v. Santana*, 526 F.3d at 1260-61.

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1   **1. There was an unreasonable delay**

2       The delay involved here was unreasonable.

3       There are actually two periods of unreasonable delay.

4       First, the government delayed for over four years by deporting  
5       the defendant from this country and then asking for a warrant.  
6       Then, even once the defendant was back in this country in 2008,  
7       and in a state jail, the government still waited until November,  
8       2008 to bring him to federal custody. Even then, the government  
9       still failed to bring him to court on the supervised release  
10      violation. Instead, the defendant was only brought to court on  
11      the new, illegal re-entry charge. Not until April 8, 2009, was  
12      the defendant finally arraigned on the Form 12 violation.

13       In *Santana*, the Ninth Circuit explained that reasonableness  
14      involves the balancing of the length of the delay and the reasons  
15      given for the delay. *Id.* at 1260. *Santana* looked first to the  
16      speedy trial case law under *Barker v. Wingo*, 407 U.S. 514, 530  
17      (1972), for guidance on the issue of reasonableness. The Ninth  
18      Circuit noted that in that framework, the Supreme Court in  
19      *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992), stated  
20      that the lower courts generally have agreed that post-accusation  
21      delay starts to become serious enough to trigger Speedy Trial  
22      analysis as it approaches one year.

23       In *Santana*, the delay did not approach one year, so the  
24      Ninth Circuit found the *Barker/Doggett* analysis inapplicable.  
25       Here, however, the delay is well over one year, and so there is a  
26      parallel. With the delay over four years here, it is  
27      presumptively unreasonable.

1       Even if the delay is not presumptively unreasonable, the  
2 government loses any balancing test. The length of delay is  
3 extraordinary, so the government better have some pretty  
4 compelling reasons for the delay. There are none. For none of  
5 this delay is there any adequate explanation or excuse available  
6 for the government. In 2004, he was in federal custody, his  
7 criminal record available to the Tucson officials, yet he was not  
8 sent back to California. In 2008, his arraignment on the Form 12  
9 was again delayed for months, even after he was actually back in  
10 the same district court in which the Form 12 slept on. None of  
11 this delay is reasonable.

12       Moreover, the government intentionally caused the delay  
13 here. The government prosecuted him in Arizona, participated in  
14 a plea deal in which he received a 60 day jail sentence, no  
15 supervised release, and deportation. Having obtained a sentence  
16 that had no strings attached, the government deported the  
17 defendant out of this country and then asked for an arrest  
18 warrant (while failing to inform the magistrate that the reason  
19 that it did not know the defendant's address in this country was  
20 because it had eliminated the defendant's address in this  
21 country). This deliberate delay weighs towards a finding of  
22 unreasonableness. See *United States v. Gregory*, 322 F.3d 1157,  
23 1162 (9th Cir. 2003) (noting that, under *Barker v. Wingo*, 407  
24 U.S. 514, 531 (1972), "the government's negligence should weigh  
25 less heavily in defendant's favor than does a deliberate delay").

26 **2. The Defendant has suffered actual prejudice**

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1       The defendant has suffered actual prejudice caused by the  
2 delay in bringing him before this Court on the supervised release  
3 Form 12 petition.

4       First, the only reason the defendant is still technically  
5 under supervised release is because the government had a warrant  
6 issued once it had deported him. This had the effect of stopping  
7 the clock on the one year period of supervised release. But,  
8 this is not a case where a defendant voluntarily absconded while  
9 on supervised release. In such a case, stopping the clock is  
10 only just. Here, however, the defendant did not voluntarily  
11 abscond. He was deported. The government cannot be allowed to  
12 artificially prolong the supervised release period by failing to  
13 timely bring the defendant to court and then asking for a warrant  
14 only after deporting the defendant. See *United States v. Hill*,  
15 719 F.2d 1402, 1405 (9th Cir. 1983) (although issuance of a  
16 warrant could toll the period of probation or parole, the warrant  
17 must be executed within a reasonable time after issuance).

18       This delay harmed the defendant. If the government had not  
19 deported the defendant in 2004, and instead returned him to this  
20 district for a supervised release violation hearing, his one year  
21 term of supervised release would have expired in 2005, even if he  
22 had received some additional time for the violation.

23       Second, the defendant negotiated a settlement in 2004 in  
24 Federal court in Tucson that involved no further supervised  
25 release. The government cannot now be allowed to resurrect a  
26 previously ignored supervised release violation four years after  
27 making a plea deal. The delay in filing the supervised release  
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1 violation means the defendant has lost the chance to argue for a  
2 concurrent sentence to the 60 day sentence he received in 2004.

3 The government's unreasonable delays in this case have thus  
4 prejudiced the defendant.

5 **CONCLUSION**

6 The Court should dismiss the Form 12 petition.

7 Dated: April 28, 2009 Respectfully submitted,

8 /S/ John J. Jordan  
9 JOHN J. JORDAN  
10 Attorney for Defendant  
11 WALTER ADILIO AJIATAS-MAZARIEGOS

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5 Counsel for Defendant  
6 WALTER ADILIO AJIATAS-MAZARIEGOS

7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9  
10 UNITED STATES OF AMERICA, ) No. CR 03-0001 CRB  
11 Plaintiff, )  
12 vs. ) **DECLARATION IN SUPPORT OF  
13 WALTER ADILIO AJIATAS- ) MOTION TO DISMISS PROBATION  
14 MAZARIEGOS, ) FORM 12**  
15 Defendant. ) Date: To Be Set  
16 ) Time: 2:15 p.m.  
17 ) Hon. Charles R. Breyer  
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17 **DECLARATION OF COUNSEL IN SUPPORT OF MOTION:**

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19 I, JOHN J. JORDAN, am an attorney licensed to practice in  
20 the State of California and do hereby declare under the penalty  
21 of perjury as follows:

22 1. I am an attorney-at-law duly authorized to practice  
23 before the Courts of the State of California, and the attorney of  
24 record for Defendant Walter Adilio Ajuntas-Mazariegos. I have  
25 reviewed the attached Motion, and I believe the factual  
26 statements made therein are true and correct to the best of my  
27 information and belief.

1           2. On April 28, 2008, the defendant informed me that he  
2 recalls that on August 9, 2004, he pled guilty in the United  
3 States District Court in Arizona to a misdemeanor violation of 8  
4 U.S.C. § 1325. He was summarily sentenced the same day to 60  
5 days custody, with no supervision to follow.

6           Defendant informs counsel that he was told this would clear  
7 his federal case, there would be no further criminal sanctions,  
8 and he would be deported after he served his sentence. Defendant  
9 also informs counsel that he was deported to his native Guatemala  
10 on approximately November 21, 2004, after serving the 60 day  
11 sentence.

12           I declare under penalty of perjury under the laws of the  
13 State of California that the foregoing is true and correct.

14           DATED: April 28, 2009                                  /S/ John J. Jordan  
15    JOHN J. JORDAN

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